

NO. PD-0075-19

APPELLATE COURT CAUSE NO. 03-18-00194-CR FILED
COURT OF CRIMINAL APPEALS
12/2/2020
IN THE COURT OF CRIMINAL APPEALS DEANA WILLIAMSON, CLERK

REYNALDO LERMA,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

**STATE'S MOTION TO SUPPLEMENT *STATE'S REPLY TO PETITION*
*FOR DISCRETIONARY REVIEW***

TO THE HONORABLE JUSTICE OF THE COURT OF APPEALS:

COMES NOW the State of Texas, by and through her Criminal District Attorney, Wesley H. Mau, and files this Motion to Supplement the *State's Reply to Petition for Discretionary Review* pursuant to Tex. R. App. P. 38.7.¹ and would show the Court the following:

A. Procedural status – case under submission as of April 8, 2020.

This Court granted the Petition for Discretionary Review on December 11, 2019. Petitioner filed his brief on January 10, 2020, and the State-Respondent filed

¹ “A brief may be amended or supplemented whenever justice requires, on whatever reasonable terms the court may prescribe.”

her brief on February 6, 2020. The case was submitted without oral argument on April 8, 2020.

B. Reason for Supplement – Relevant cases handed down since submission

In the *State’s Reply to Petition for Discretionary Review*, the State argued that the Third Court of Appeals properly held that the district court abused its discretion in granting Petitioner’s motion to dismiss the capital murder charges against him pursuant to Texas Rule of Evidence 508 (“Rule 508”).² The Third Court of Appeals concluded that Petitioner had failed to meet his burden of showing that a reasonable probability exists that the informer could give testimony necessary to a fair determination of his guilt or innocence.³

After the parties filed their briefs, intermediate courts of appeals issued several relevant opinions regarding the application of Rule 508. In each case, the appellate court’s decision is consistent with the State’s position here, *i.e.*, without evidence establishing a direct connection between the confidential informant and the case before the court, a judge errs to order disclosure of the confidential informant’s identity.

² *State v. Lerma*, 03-18-00194-CR, 2018 WL 5289452, at *1 (Tex. App.—Austin Oct. 25, 2018, pet. granted December 11, 2019) (mem. op., not designated for publication).

³ *Id.*

C. Supplemental cases – Appellate courts continue to require a direct connection between the confidential informant and the offense charged before disclosure should be required under Rule 508.

Most recently, in *State v. Dunn*,⁴ the appellee was charged with drug possession after a confidential informant told police that the informant had arranged a drug deal with the appellee and told police where they could find him. The trial court granted the appellee’s motion to dismiss under Rule 508 when the State refused to divulge the confidential informant’s identity.⁵ The Fourteenth Court held that the trial court abused its discretion by ordering disclosure of the informant’s identity under Rule 508(c)(2) because the “appellee failed to introduce any evidence establishing any connection at all between the confidential informant and the actual drug charge at issue.”⁶

Similarly, the First Court held in *Garcia v. State* that when an informant was involved in arranging the narcotics transaction, but the informant did not participate in, and was not present for, the exchange, the informant’s identity need not be disclosed.⁷

In *Hirst v. State*, a “search-and-arrest warrant [affidavit] alleged that the confidential informant told [a detective] that Hirst possessed a quantity of

⁴ *State v. Dunn*, 14-19-00701-CR, 2020 WL 6741544, at *1 (Tex. App.—Houston [14th Dist.] Nov. 17, 2020, no pet. h.) (mem. op., not designated for publication).

⁵ *Id.*

⁶ *Id.* at *3. Note that *Dunn* also holds that the trial court erred in ordering disclosure under Rule 508(c)(3), which permits a court to order the informer’s identity disclosed when “(i) information from an informer is relied on to establish the legality of the means by which evidence was obtained; and (ii) the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible. Appellee here did not urge disclosure under subsection (c)(3).

⁷ *Garcia v. State*, 01-18-00974-CR, 2020 WL 4118019, at *3-4 (Tex. App.—Houston [1st Dist.] July 21, 2020, no pet.) (mem. op., not designated for publication).

methamphetamine in a motel room within the preceding twenty-four hours.”⁸ Although Hirst speculated that the informant was the same person who had brought the drugs to him, he “did not make a plausible showing that the informant might be the same person responsible for the methamphetamine, beyond his mere conjecture or speculation to that effect.”⁹ Without such showing, the Third Court of Appeals held that the trial court properly denied the defendant’s request for a hearing under Rule 508.¹⁰

In *Davis v. State*, the appellant was subjected to a traffic stop after a confidential informant told police that appellant would be found with drugs.¹¹ The Austin Court held that neither an *in camera* hearing nor disclosure of the informant’s identity was required “[b]ecause Davis failed to make a plausible showing that the confidential informant’s testimony was necessary to a fair determination of guilt or innocence.”¹²

In *Byrd v. State*, a search warrant affidavit alleged that a confidential informant had observed the appellant possessing cocaine within the past forty-eight hours.¹³ The Court held, however, that the appellant had failed to demonstrate a need to disclose the

⁸ *Hirst v. State*, 03-19-00410-CR, 2020 WL 4929777, at *2 (Tex. App.—Austin August 19, 2020, no pet.) (mem. op., not designated for publication).

⁹ *Id.* at *4.

¹⁰ *Id.*

¹¹ *Davis v. State*, 03-19-00120-CR, 2020 WL 3481154, at *1 (Tex. App.—Austin June 26, 2020, pet. ref’d). (mem. op., not designated for publication).

¹² *Id.* at *8.

¹³ *Byrd v. State*, 07-19-00128-CR, 2020 WL 2786862, at *2 (Tex. App.—Amarillo May 27, 2020, no pet.) (mem. op., not designated for publication).

informant's identity because "the informant was not a witness to the alleged offense and was not present when the search warrant was executed."¹⁴

Since the State has submitted her brief, Texas appellate courts have at least five times held that disclosure was not proper when the evidence fails to establish a direct link between a confidential informant and the charged crime. The links between the informants and the charged crimes were, in each case listed above, far stronger than the link alleged by Appellee in this case. While the informants discussed above might have been able to testify as to why the defendant possessed drugs or whether the defendant intended to sell drugs, the informant whose identity Appellee sought to disclose had no such connection to the robbery in which Appellee participated.

The Third Court's holding in this case is in accord with the cases cited above. On the other hand, a diligent search has revealed no appellate decisions handed down since the briefs were filed that would support the trial court's decision, which the Third Court reversed.

D. Prayer

Because the relevant caselaw cited above was not available at the time the State filed her original reply, the State now requests that the Court permit the State to supplement her brief with the additional cases summarized in this motion.

¹⁴ *Id.* at *4.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TEX. R. APP. P., RULE 9.4

I certify that this motion contains 996 words, exclusive of the caption, procedural status, signature, proof of service, certification, certificate of compliance, and appendix/index of authorities. When added to the word count of the *State's Reply to Petition for Discretionary Review*, the total is under 15,000 words.¹⁵

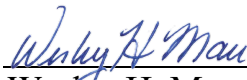
Wesley H. Mau

Wesley H. Mau
Criminal District Attorney

¹⁵ “A brief and response in appellate court [must not exceed] 15,000 words if computer-generated.” Tex. R. App. P. 9.4.

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing brief has been email-delivered via e-filing to Petitioner's counsel on this the 30th day of December, 2020.



Wesley H. Mau
Criminal District Attorney

APPENDIX / INDEX OF AUTHORITIES CITED FOR SUPPLEMENT

CASES

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